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by Eva Schlumpf



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by Eva Schlumpf*

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Abstract

According to a study made by the Moroccan NGO Insaf (Institution Nationale de Solidarité avec les Femmes en détresse), 27'199 women gave birth to 45'424 children without being married in Morocco in 2009.¹ Every single day, 153 children of unknown paternity were born, of which 24 were abandoned.² Not as high but just as alarming numbers of the year 2008 were published in a report by UNICEF and the Ligue Marocaine pour la Protection de l'Enfance in 2010.³ And the rising number of court cases dealing with the issue of abandoned children (5'274 cases in 2009 and 5'377 cases in 2013) indicates that it remains a matter of concern.⁴ In 1990 Morocco has signed the UN Convention on the Rights of the Child (CRC). This was a first big improvement for the rights of the Moroccan children and their mothers in general. In 2004 the family code of Morocco's Personal Status law – the Moudawana – was reformed. Concerning the children's rights, the commitment to the CRC directly influenced the reform of the family code. The various amendments of the Moroccan law in the past thirty years have significantly improved the

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¹ Available at <http://www.lavieeco.com/news/societe/4-des-femmes-qui-accouchent-sont-des-meres-celibataires-19591.html>, last accessed 5 September 2015.

² Available at <http://www.lavieeco.com/news/societe/4-des-femmes-qui-accouchent-sont-des-meres-celibataires-19591.html>; <http://www.lavieeco.com/news/actualites/association-insaf-24-bebes-abandonnes-par-jour-au-maroc-23401.html>, both last accessed 5 September 2015.

³ Available at http://www.unicef.org/adolescence/morocco_55422.html, last accessed 5 September 2015.

⁴ Available at <http://www.infosoir.com/actualite/1266-maroc-15-cas-d-enfants-abandonnes-chaque-jour.html>, last accessed 5 September 2015.

legal situation. However, the issue of illegitimate and abandoned children remains worrisome as it is not merely a legal but more a social and cultural problem deeply rooted in the Moroccan society.

I. Introduction

Orphan(s) of Islam – this is the title of two books I have read in the past year, which are very unequal yet similar.⁵ The first one is a novel by ALEXANDER KHAN, telling the true story of the three-year-old Mohammed, born in England to an English mother and a Pakistani father, who is, together with his younger sister, taken away from the secular mother and brought to Pakistan by his father and his family in order to become a good Muslim.

The second book by Jamila Bargach is more technical but not less devastating. It is an ethnography portraying the lives of abandoned children, whether they are street children, orphans or children born out of wedlock in Morocco. The book contains facts and figures, interviews with illegitimate children, adoptive parents, social workers and explains the social, historical, political and legal background of this issue in Morocco.

Despite the differences, overall the two books approach the same issue and I became aware that it is a subject of great significance within Islamic societies, however also highly complex. One must understand the historical and cultural background of the issue. I also learned that in Islam an orphan is not necessarily a child who has neither mother nor father. The orphan in Islam describes a child whose father has died before it has reached maturity, or a child deprived of parental care and lacking support from both or either parent (who might still be alive).⁶ However, most of the time it refers to a child who does not have a known father, or paternity to a known father cannot be established and therefore a child is illegitimate. Islamic law knows two categories of children: legitimate and illegitimate children. Only children born to a married couple can be legitimate, whereas children born out of wedlock are not legally recognized, as extramarital sexual intercourse is considered a sin and is a criminal offence, also under the Moroccan Penal Code. These children have no legal status and belong to the most socially marginalized people not only in Morocco but in all MENA (Middle Eastern and North African) states.⁷ In this paper I will examine the situation of children born out of wedlock in Morocco.

⁵ KHAN ALEXANDER, *Orphan of Islam*, London 2012; BARGACH JAMILA, *Orphans of Islam: Family, Abandonment and secret Adoption in Morocco*, Lanham/Boulder/New York/Oxford 2002.

⁶ ARSHAD RAFFIA, *Islamic Family Law*, London 2010, at 171, M.9.2; TUCKER JUDITH E., *Women, Family, and Gender in Islamic Law*, New York 2008, at 156.

⁷ WILLMAN BORDAT STEPHANIE/KOUZZI SAIDA, *Legal Empowerment of Unwed Mothers: Experiences of Moroccan NGOs*, Legal Empowerment Working Papers, Paper No. 14, Rome 2010, available at: <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id=138103>, last accessed 27 September 2015, at 1.

II. A historical summary of the Moroccan family law

1. Up to 1993

The Kingdom of Morocco became independent in 1956.⁸ Only one year later Morocco's first Personal Status Law, the '*Moudawana*', was established and came into force in 1958.⁹ For the young Kingdom it was an important symbol of unity and modernity. However, the *Moudawana* was in fact not able to really reform the law in Morocco, as it was more a reinterpretation and simple codification or even transcription of the classical Islamic Mālikī family law.¹⁰ The patriarchal beliefs remained and the *Moudawana* clearly reiterated the inferior position of women, for example that a woman always needed a male guardian or the approval of their matrimonial guardian, the '*walī*', to get married.¹¹ The lasting influence of the classical Mālikī School can still be seen today in art. 400 *Moudawana*, where it is ruled that for all issues not regulated in the present *Moudawana* the opinion of the Mālikī School should be drawn upon to resolve the problem.¹² The unequal treatment of women in the first *Moudawana* existed for many years and was ignored by society and the government despite the constitution, which was voted for in 1962, and which stipulated equal political rights for males and females.¹³ Moreover, no national codification concerning abandoned children existed then. Only in 1962 the general secretary of the government signed a circular addressed to all local governors, elevating this issue to national significance.¹⁴ It was a first small step by the state towards the official awareness of the situation of abandoned children. The circular clearly distinguished between adoption, which is prohibited, and '*kafala*', the legal guardianship, which is considered a charitable and humanitarian act without any effects of filiation such as taking the name of the parents.¹⁵ In 1983 the Ministry of Interior Affairs issued a similar circular also describing the procedure of taking *kafala*. However, an official national law still did not exist.¹⁶

⁸ WEINGARTNER LAURA A., Family Law & Reform in Morocco – The Mudawana: Modernist Islam and Women's Rights in the Code of Personal Status, in: Baderin Mashood A. (Ed.), Islamic Law in Practice, Volume III, Surrey/Burlington 2014, 199-225, at 202.

⁹ ENNAJI MOHA, The New Muslim Personal Status Law in Morocco: Context, Proponents, adversaries and Arguments, New Brunswick/Fes 2004, at 11; HARRAK FATIMA, The History and Significance of the New Moroccan Family Code, Working Paper No. 09-002, Institute for the Study of Islamic Thought in Africa (ISITA), Working Paper Series, Evanston 2009, at 2.

¹⁰ CHARRAD MOUNIRA M., Family Law Reforms in the Arab World: Tunisia and Morocco, Report for the United Nations, Austin 2012, 7; ENNAJI, *supra* n. 9, at 2; GUESSOUS NOUZHA, Women's rights in Muslim societies: Lessons from the Moroccan experience, in: Philosophy and Social Criticism 38(4-5), Boston 2012, 525 – 533, at 527; POUPART ANDRÉ, Adaptation et immutabilité en droit musulman, L'expérience marocain, Paris 2010, at 137.

¹¹ CHARRAD, *supra* n. 10, at 11; ENNAJI, *supra* n. 9, at 2; POUPART, *supra* n. 10, at 138.

¹² Also indicated by HARRAK, *supra* n. 9, at 2 and a reference in the preamble of the *Moudawana* can be found. Dahir N° 1-04-22 du 12 Hija 1424 (3 Février 2004) portant promulgation de la Loi N° 70-03 portant Code De La Famille (*Moudawana*), an unofficial English translation of the original Arabic text is available at: <http://www.hrea.org/moudawana.html>, last accessed 27 September 2015.

¹³ POUPART, *supra* n. 10, at 138; WEINGARTNER, *supra* n. 8, at 202.

¹⁴ BARGACH, *supra* n. 5, at 41.

¹⁵ BARGACH, *supra* n. 5, at 42.

¹⁶ BARGACH, *supra* n. 5, at 42 f.

2. Reform in 1993

For almost forty years, the Personal Status Law in Morocco remained untouched. However, Morocco's women were not inactive and feminist movements started to organize themselves.¹⁷ In 1990, the Union de l'action feminine (UAF) launched a petition and collected one million signatures calling for an amendment of the *Moudawana*.¹⁸ But the opposition was strong and in the end only minor changes were made.¹⁹ Along with these small amendments to the *Moudawana*, the Parliament also for the first time ratified a bill concerning abandoned children.²⁰ This was a major improvement since this issue, previously ignored, was finally given official and legal recognition. On the other hand, the new law contained many weaknesses. People involved with abandoned children, such as social workers, claim that the situation even worsened. Prior to the new law, women who wanted to abandon their child could go to a hospital and, after an interview with a social worker clarifying her intention to abandon her child, she could officially abandon the child by signing an official paper.²¹ With the new law, every case had to be reported to the police and a criminal procedure was initiated for both adultery and abandonment, which are criminal offences under the Moroccan Penal Code.²² In light of this new rule, it was not surprising that the number of secret abandonments in public spaces or secret adoptions increased.²³ Despite these various, but minor changes in the legislation, the feminist movement could not yet reach their goals to improve the rights of women and children. However, awareness of the issue was raised.

3. Reform in 2004

In the aftermath of these first initiatives in the early 1990s, things continued to progress. Human rights groups and women activist groups grew stronger and bigger. Also, King Hassan II was aware of the human rights situation in his country and the image projected to the rest of the world, which is why he supported the new government.²⁴ In 1998, the new government initiated a 'Plan d'Action' as a proposal to improve the status of women in Morocco.²⁵ Due to massive resistance from Islamists and traditionalists, the plan however was doomed to failure. With the death of King Hassan II in 1999, and the accession of his son Mohammad VI to the throne, hopes for reform were raised again.²⁶ The new leader pushed for changes to modernize

¹⁷ POUPART, *supra* n. 10, at 138; WALTZ SUSAN/BENSTEAD LINDSAY, When the Time is Ripe: The Struggle to Create an Institutional Culture of Human Rights in Morocco, in: Chase Anthony/Hamzawy Amr (Eds.), Human Rights in the Arab World, Independent Voices, Philadelphia 2006, 174 – 195, at 181.

¹⁸ BARGACH, *supra* n. 5, at 67 f.; ENNAJI, *supra* n. 9, at 23; HARRAK, *supra* n. 9, at 2; POUPART, *supra* n. 10, at 138; SALIME ZAKIA, Between feminism and Islam: Human Rights and Sharia Law in Morocco, Minneapolis/London 2011, at 24, 30 ff.; WALTZ/BENSTEAD, *supra* n. 17, at 183.

¹⁹ POUPART, *supra* n. 10, at 139; SALIME, *supra* n. 18, at 46 f., 65; WALTZ/BENSTEAD, *supra* n. 17, at 184; WEINGARTNER, *supra* n. 8, at 203.

²⁰ BARGACH, *supra* n. 5, at 34.

²¹ BARGACH, *supra* n. 5, at 37, 39, 113.

²² Art. 490 f. and art. 459 ff. Code Pénal (Dahir N° 1-59-413 du 28 Joumada Ii 1382 (26 Novembre 1962) portant approbation du texte du Code Pénal); BARGACH, 37, 216.

²³ BARGACH, *supra* n. 5, at 37, 39 f.

²⁴ HARRAK, *supra* n. 9, at 3 f.; WALTZ/BENSTEAD, *supra* n. 17, at 176; WEINGARTNER, *supra* n. 8, at 202.

²⁵ EL HAJJAMI AÏCHA, The Religious Arguments in the Debate on the Reform of the Moroccan Family Code, in: Mir-Hosseini Ziba/Vogt Kari/Larsen Lena/Moe Christian (Eds.), Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition, London 2013, 81 – 105, at 81; HARRAK, *supra* n. 9, at 4; POUPART, *supra* n. 10, at 40; WALTZ/BENSTEAD, *supra* n. 17, at 184.

²⁶ HARRAK, *supra* n. 9, at 5; WALTZ/BENSTEAD, *supra* n. 17, at 184.

his kingdom, demonstrations organized by women's groups took place, and the King created a committee (unlike his father, even inviting three women to sit on the committee) to provide advice on reforming the *Moudawana*.²⁷ After two years of work but no substantial sign of change, people feared another failure. In the end, it ironically was a tragic incident relating to the Islamic faith that was the decisive factor for the success of the reform. In May 2003, Casablanca was hit by a suicide bomb attack committed by radical Islamists, killing 45 people and injuring nearly 200.²⁸ Populist Islamic groups lost popularity and political influence immediately, and the King seized the opportunity to announce that he was bringing forward a proposal for a new *Moudawana*.²⁹ Only ten months later, in January 2004, the Moroccan parliament passed the new family code.³⁰ The new *Moudawana* did not completely emancipate women but improved their situation significantly.³¹ Furthermore, the new family law helped to change other statutes such as the Labor Code or the Nationality Code.³²

The reform of the *Moudawana* in 2004 had long been awaited and was the achievement of a longstanding process involving different actors, with human rights groups and women's movements playing a key role. Today, Morocco's law is considered as one of the most progressive in the Arab world and, after Tunisia, considered to be the second most advanced country with regard to the equality of women and men.³³ It offers a much wider protection from abuse and discrimination for women and children than the former *Moudawana*.

III. Parent-Child relationship and the concept of *nasab*

The relationship between a child and its parents consists of different aspects. There is the emotional tie, the biological bond of sharing the same blood and genes and there is the legal relationship from which arise rights and obligations for both the parents and the child. The legal relationship is defined through the law and social values and bears direct consequences for the parents and the child concerning matters such as guardianship, maintenance, fosterage, custody, inheritance or parentage. Parentage is the key to all the other rights as only through the establishment of parentage can a child be legitimate and therefore be entitled to the other rights.³⁴ MONJID points out that Moroccan law distinguishes 'filiation parentale' ('*bounouwa*') from 'filiation paternelle' ('*nasab*') and that the sacred *nasab* can only be established for a legitimate child to his father, whereas *bounouwa* is established to both parents through their procreation of the child, whether it was legitimate or illegitimate (Art. 142 *Moudawana*).³⁵ The parentage to the mother is established through birth and consequently only to the natural

²⁷ EL HAJJAMI, *supra* n. 25, at 83; ENNAJI, *supra* n. 9, at 14; HARRAK, *supra* n. 9, at 5 f.; POUPART, *supra* n. 10, at 141; SALIME, *supra* n. 18, at 87 f.; WALTZ/BENSTEAD, *supra* n. 17, at 184 f.

²⁸ ENNAJI, *supra* n. 9, at 14; POUPART, *supra* n. 10, at 146; SALIME, *supra* n. 18, at 110; WALTZ/BENSTEAD, *supra* n. 17, at 185.

²⁹ SALIME, *supra* n. 18, at 115; WALTZ/BENSTEAD, *supra* n. 17, at 185.

³⁰ Instead of many EL HAJJAMI, *supra* n. 25, at 83; WEINGARTNER, *supra* n. 8, at 199.

³¹ EL HAJJAMI AÏCHA, *Le Code de la famille à l'épreuve de la pratique judiciaire: Enquête de terrain*, Marrakech 2009, at 25.

³² GUESSOUS, *supra* n. 10, at 530.

³³ CHARRAD, *supra* n. 10, at 2; WALTZ/BENSTEAD, *supra* n. 17, at 186.

³⁴ NASIR JAMAL J., *The Islamic Law of Personal Status*, Leiden/Boston 2009 (*cit.* NASIR, ...), 145; NASIR JAMAL J.: *The Status of Women under Islamic Law and Modern Islamic Legislation*, Leiden/Boston 2009 (*cit.* NASIR, *Status of Women*, ...), 169.

³⁵ FOLETS MARIE-CLAIRE/CARLIER JEAN-YVES, *Le Code Marocain de la Famille, Incidences au regard du droit international privé en Europe*, Brussels 2005, at 75, 77; MONJID MARIAM, *L'Islam et la modernité dans le droit de la famille au Maghreb*, Paris 2013, at 146 f.

mother.³⁶ A mother cannot deny her child and, as art. 146 *Moudawana* states, filiation to the mother has the same effects whether the child was the result of a legitimate or illegitimate relationship. On the other hand, the parentage to the father ('filiation paternelle' or '*nasab*') can only be established for a legitimate child.

Nasab identifies the lineage of a person. It is a patronym (name of the father) or a series of patronyms, which is usually in the third position of one's name and is included to indicate the lineage.³⁷ This lineage tie between family members is deemed to be one of God's great gifts to his believers.³⁸ Lineage (or '*nasab*') indicates the parentage of a child and consequently the establishment of all legal rights and claims.³⁹

BARGACH describes lineage-*nasab* as the backbone and most fundamental organizational principle of Muslim society.⁴⁰ Together with '*wasat*' (environment) and '*tarbiyah*' (education), the group of '*asl*' and '*nasab*' (roots and lineage) builds a triangle, which defines a Muslim person.⁴¹ Only when a person has a certain background is he or she complete. This background is seen in a proper environment ('*wasat*') provided by the parents, family and neighborhood, in *tarbiyah* as a certain education, behavior and manner of a person and, last but not least, in *asl* and *nasab*, the blood lineage but also the social identity resulting from a point of geographic and cultural origin.⁴² This triangle is deeply rooted in Islam, which is one explanation for the sacred status of blood.

The only means through which lineage-*nasab* can be established are blood (kinship) and marriage. Lineage-*nasab* is therefore passed through the male via blood and through the female via marriage.⁴³ "And He it is Who hath created man from water, and hath appointed for him kindred by blood and kindred by marriage; for the Lord is ever Powerful".⁴⁴ This verse is often cited when explaining the concept of *nasab* and it strengthens the belief that *nasab* is a blessing and grace, a gift from God.⁴⁵ This gift was made in order to give structure and organization to human beings. The avoidance of an amoral and unnatural condition among mankind is the aim.⁴⁶ This means a legal union is absolutely essential to establish lineage-*nasab* and it can never originate from adultery. The latter is considered one of the greatest sins in Islam, because it is a mixing up of lineage-*nasab*.⁴⁷ It could lead to incestuous relations and would therefore result in the feared condition of personal and social immorality, chaos and even economic and financial dislocation.⁴⁸ The sacred status of blood is emphasized as it is even deemed to be a religious

³⁶ BÜCHLER ANDREA, *Das islamische Familienrecht: Eine Annäherung*, Bern 2003, at 57; NASIR, *supra* n. 34, at 146; NASIR, *Status of Women*, *supra* n. 34, at 169.

³⁷ ARSHAD, *supra* n. 6, at 176, M. 9.3.1.

³⁸ SONBOL AMIRA EL-AZHARY, *Adoption in Islamic Society: A Historical Survey*, in: Warnock Elizabeth (Ed.), *Children in the Muslim Middle East*, Austin 1995, 45–67, at 48.

³⁹ WELCHMANN LYNN, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*, Amsterdam 2007, at 143.

⁴⁰ BARGACH, *supra* n. 5, at 56 f.

⁴¹ BARGACH, *supra* n. 5, at 88.

⁴² BARGACH, *supra* n. 5, at 85 – 91.

⁴³ BARGACH, *supra* n. 5, at 54, 56.

⁴⁴ Qur'ān 25:54 as translated in BARGACH, *supra* n. 5, at 56.

⁴⁵ BARGACH, *supra* n. 5, at 58.

⁴⁶ BARGACH, *supra* n. 5, at 58.

⁴⁷ BARGACH, *supra* n. 5, at 57 f.; SONBOL, *supra* n. 38, at 49.

⁴⁸ BARGACH, *supra* n. 5, at 58; SONBOL, *supra* n. 38, at 48 f.

duty of every Muslim to assure a clean and pure lineage-*nasab*.⁴⁹ But it is not only due to the fear of incest that it is important to acquire lineage-*nasab*. Having a lineage-*nasab* also means having a father and being legitimate and hence being entitled to all the fundamental rights of kinship such as care, guardianship, maintenance, education and, perhaps most importantly, inheritance.⁵⁰ Furthermore, the marriage impediments are established and a person is taken into the existing family accountability (*'hasab'*) when lineage-*nasab* is fixed.⁵¹ These rights and kinship effects only arise through legal kinship to the father, i.e. being born in a legal union and therefore being legitimate and having a lineage-*nasab*. Biological paternity is not sufficient.⁵² Art. 152 *Moudawana* enumerates the three alternatives to establish paternity as being the conjugal bed, acknowledgment or sexual intercourse by error. Yet, under no circumstances can filiation to a father be determined for an illegitimate child. This is clearly stated in art. 148 *Moudawana*: “Illegitimate filiation to the father does not produce any of the effects of legitimate filiation.”⁵³ Only the exceptions of acknowledgment by the father and evidence of witnesses offer two additional ways to establish paternity. Therefore, avoiding the illegitimacy of a child is most crucial in order to establish paternity. In today's Moroccan law, several methods are accepted to prove paternity.⁵⁴ These are: the conjugal bed, acknowledgement of the father, the testimony of two public notaries (*'adouls'*) or oral testimony, and all other legal means, including judicial expertise, particularly through a DNA test.⁵⁵ This last possibility, “all other legal means”, was one of the reforms in the new Moroccan family code and, through the ability of courts to require an expertise, provided the courts with an important weapon to fight the illegitimacy of children.⁵⁶ However, the first three traditional methods have remained much more common and important, as the DNA test can only be imposed in certain circumstances, when offer and acceptance of marriage have been made but the contract due to ‘overwhelming circumstances’ has not been formally completed.⁵⁷ Indeed, over the course of one year (2005-2006), only two DNA tests were imposed on possible fathers.⁵⁸ Moreover, only judges can order such an expertise and none of the father, the mother or the child has the right to demand a DNA testing.⁵⁹ A further obstacle are the comparatively high costs of such a test (some \$ 350 US), which have to be borne by the woman.⁶⁰

The next section will outline the methods through which lineage-*nasab* can be established.

1. Through marriage

A quotation of the Prophet says: “A child is considered legitimate through the relationship which unites its mother with her husband, and one born of adultery is to be deprived

⁴⁹ BARGACH, *supra* n. 5, at 52, 58; SONBOL, *supra* n. 38, at 48 f.

⁵⁰ NASIR, *supra* n. 34, at 145, 154; NASIR, Status of Women, *supra* n. 34, at 169, 181; WELCHMANN, *supra* n. 39, at 143 f.

⁵¹ BARGACH, *supra* n. 5, at 56, 60.

⁵² WELCHMANN, *supra* n. 39, at 143 f.

⁵³ Art. 148 *Moudawana*.

⁵⁴ FOBLETS/CARLIER, *supra* n. 35, at 81.

⁵⁵ Art. 158 *Moudawana*; WELCHMANN, *supra* n. 39, at 145.

⁵⁶ WELCHMANN, *supra* n. 39, at 144 f.

⁵⁷ WELCHMANN, *supra* n. 39, at 145 indicating that this regulation addresses the problem of *'fatiha'* marriages in Morocco not formalised by a marriage deed.

⁵⁸ WELCHMANN, *supra* n. 39, at 145.

⁵⁹ FOBLETS/CARLIER, *supra* n. 35, at 82.

⁶⁰ WELCHMANN, *supra* n. 39, at 145.

thereof.”⁶¹ As a result of this quotation, the child is presumed to be legitimate when it is born within marital ties and the husband of the child’s mother is presumed to be the father and cannot deny his parentage.⁶² Art. 151 *Moudawana* states that paternity is established by presumption. However, this is not always as clear as it may seem, for different rules apply to the minimum and maximum terms of the pregnancy. In addition, there may be questions about whether the marriage contract is valid or irregular or there may not even be a contract.

A common question concerning lineage through marriage is when the marriage actually starts. This can either be at the time when the marriage contract is concluded or when the marriage is consummated, i.e. at the time of the first physical engagement between the couple.⁶³ Most Sunni schools argue that marriage is only effective when the possibility of sexual encounter between husband and wife exists.⁶⁴ In contrast, for the Hanafi school (Sunni) and the Shia schools, the time of contract is sufficient.⁶⁵ The determination of the actual date of union is closely linked to the next question of the length of pregnancy, as it is crucial to know from what date on the “legitimate” pregnancy has to be counted.

In traditional Islamic law the minimum term of pregnancy is set at six months, a period that all schools agree on.⁶⁶ The calculation of this period goes back to two Qur’ānic verses.⁶⁷ In the personal status law of Sunni Morocco, this minimum term of pregnancy is enshrined in art. 154 para. 1 *Moudawana*, which states that paternity is proven by the conjugal bed if the child is born at least six months after the marriage contract was concluded. In paragraph 2 of art. 154 and art. 135 *Moudawana*, the maximum pregnancy term is stated. Today, it is set at one year unanimously under the majority of the modern Arab personal status laws, although it used to be much more disputed and was extended to as much as two and even more years.⁶⁸ In particular, the Mālikī custom used to recognize a maximum gestation period of five years.⁶⁹ It was believed that the fetus was sleeping inside the womb and was only aroused later on.⁷⁰ This so called “*Ragued*” (Moroccan colloquial Arabic for asleep) or “sleeping baby” possesses legal foundation and is legitimate.⁷¹ Under this maximum period a child can only be legitimate if it is born not more than one year after the date of separation, whether the separation is due to divorce, annulment of the marriage or death of the husband.⁷²

⁶¹ ALAOUÏ M'DAGHRI MUHAMMAD ABDELKEBIR, The Code of Children's Rights in Islam, in: Warnock Elizabeth (Ed.), Children in the Muslim Middle East, Austin 1995, 30–41, at 39.

⁶² ALAOUÏ, *supra* n. 61, at 39.

⁶³ BARGACH, *supra* n. 5, at 59; NASIR, *supra* n. 34, at 147; NASIR, Status of Women, *supra* n. 34, at 171; PEARL DAVID/MENSKI WERNER, Muslim Family Law, London 1998, at 400, M. 10-07.

⁶⁴ BARGACH, *supra* n. 5, at 59; NASIR, *supra* n. 34, at 147; NASIR, Status of Women, *supra* n. 34, at 171.

⁶⁵ BARGACH, *supra* n. 5, at 59; NASIR, *supra* n. 34, at 147; NASIR, Status of Women, *supra* n. 34, at 171.

⁶⁶ BARGACH, *supra* n. 5, at 59; NASIR, *supra* n. 34, at 146; NASIR, Status of Women, *supra* n. 34 at 170; PEARL/MENSKI, *supra* n. 63, at 400, M. 10-07; SCHIRRMACHER CHRISTINE/SPULER-STEGEMANN URSULA, Frau und die Scharia: Die Menschenrechte im Islam, Kreuzlingen/München 2004, at 46 f.; WELCHMANN, *supra* n. 39, at 142 f.

⁶⁷ Qur’ān 31:14 and 46:15.

⁶⁸ For example the Hanbali, Shafi’i and most of the Mālikī set the duration at four years, some even at five years. BARGACH, *supra* n. 5, at 59; NASIR, *supra* n. 34, at 146; NASIR, Status of Women, *supra* n. 34, at 170; PEARL/MENSKI, *supra* n. 63, at 400, M. 10-06; see also WELCHMANN, *supra* n. 39, at 143.

⁶⁹ BARGACH, *supra* n. 5, at 162.

⁷⁰ SCHIRRMACHER/SPULER-STEGEMANN, *supra* n. 66, at 47.

⁷¹ BARGACH, *supra* n. 5, at 59 f., 162 f.

⁷² NASIR, *supra* n. 34, at 150; NASIR, Status of Women, *supra* n. 34, at 174.

If all these requirements are met and the child is born within the preceding mentioned period and under a valid marriage contract, paternity between the husband and the child is established. Nevertheless, in classical Islamic law the father has two methods to refute his paternity. He can either deny his paternity at the time of the birth, or at the time that he finds out about the birth in case he was absent.⁷³ The second way is through imprecation, called '*lian*',⁷⁴ whereby the husband pledges under oath before a judge that his wife committed fornication and that he is not the father of the child.⁷⁵ Moroccan law has adopted these provisions to a certain degree in art. 153 *Moudawana*, which says that the conjugal bed is the irrefutable proof of paternity, and only through disavowal by the husband through an accusation of his wife or by an expertise (e.g. DNA testing, one of the reforms of 2004) can paternity be disallowed. In addition, the law postulated that the husband must have solid proof for his allegation or that the expertise must have been ordered by judicial decision. If paternity is then deprived, which can also only be done by judicial decree for the protection of the child,⁷⁶ the child is effectively illegitimate, and so all the rights between the husband and the child such as maintenance or inheritance will be void, but an illicit degree of kinship between the child and the husband arises.⁷⁷

In case the marriage is invalid because it is defective or null and void, it is an irregular marriage contract, which eventually can either be validated or must be dissolved. In classical Islamic law, all schools agree that in the case of an irregular contract, the length of pregnancy has to be counted not from the date of the contract, as it is irregular, but from the time of consummation.⁷⁸ So, whenever a child is born not less than six months nor more than nine months after consummation, paternity shall be established, whether it is before or after separation, even though the marriage had to be annulled due to an irregular contract.⁷⁹ Art. 56 to 64 *Moudawana* regulate the invalid marriage and its effects. Art. 58 *Moudawana* adapts this traditional rule for an invalid marriage will still establish paternity after consummation when the couple acts in good faith. Also, art. 157 *Moudawana* stipulates that, once paternity is established even under an irregular contract, all effects of kinship are created. These provisions both intend to protect the child from the status of illegitimacy.

In the case when there is no marriage contract, paternity can usually not be established, at least not through the conjugal bed. However, there is the exception of so-called sexual relationship by error, when sexual intercourse by mutual agreement took place and the couple believed to have the right thereto (when they thought they were husband and wife). In that case, paternity can be established because the parents did not have the intention to commit adultery and the

⁷³ NASIR, *supra* n. 34, at 147; NASIR, Status of Women, *supra* n. 34, at 171.

⁷⁴ BARGACH, *supra* n. 5, at 61; ENGINEER ASGHAR ALI, The Rights of Women in Islam, New York 1992, at 66; NASIR, *supra* n. 34, at 147 f.; NASIR, Status of Women, *supra* n. 34, at 172; PEARL/MENSKI, *supra* n. 63, at 400, M. 10-09.

⁷⁵ NASIR, Status of Women, *supra* n. 34, at 119, 172.

⁷⁶ Art. 151 and 159 *Moudawana*; NASIR, *supra* n. 34, at 148; NASIR, Status of Women, *supra* n. 34, at 173.

⁷⁷ NASIR, *supra* n. 34, at 148; NASIR, Status of Women, *supra* n. 34, at 172; SONBOL, *supra* n. 38, at 50 who indicates that a child with no paternity due to a *lian* cannot inherit from the father. However, a girl could marry her 'father' under Shafi law. Yet, as this is not accepted in society, since she might have been raised by this man, such marriages are refused, which explains the creation of the illicit degree of kinship between 'father and daughter' although paternity was revoked through the *lian*.

⁷⁸ NASIR, *supra* n. 34, at 149; NASIR, Status of Women, *supra* n. 34, at 173.

⁷⁹ NASIR, *supra* n. 34, at 149; NASIR, Status of Women, *supra* n. 34, at 173; WELCHMANN, *supra* n. 39, at 143.

child will be attributed to the man as long as the child is born within the designated pregnancy period and if the man does not confess the child as a product of adultery.⁸⁰

A second case occurs when offer and acceptance of marriage have been made and agreed to but, for some reason ('force majeure' or 'overwhelming circumstances'), the contract could not be formally concluded, and in that engagement period the woman gets pregnant.⁸¹ Under these circumstances, paternity of the child is appointed to the fiancé provided that three conditions are met. First, the families of the two engaged people must have known about the engagement and the tutor of the woman must have given his approval, if necessary. Second, the woman must have become pregnant during the engagement period. Third, the couple must have accepted responsibility for the pregnancy. It is precisely for this situation, but where the man denies his responsibility, that under the new law judges are empowered to require that the man take a DNA test in order to determine his paternity.⁸² Art. 156 *Moudawana* has to be read in combination with art. 16 *Moudawana*, limiting the period of such recognition to five years. FOBLETS and CARLIER raise the question why such a limit was set, albeit the aim of this regulation is the establishment of paternity and not the recognition of the marriage.⁸³

2. Through acknowledgment ('*iqrār*')

Although the conjugal bed is the regular way to establish lineage, Islamic law has accepted other means for doing so. One is the acknowledgment of a child by its father (and in some schools also the mother).⁸⁴ In general, four conditions need to be fulfilled to acknowledge a child. First, the child needs to be of unknown parentage. Second, it needs to be plausible that the man is actually the father of the child. Thus, for example, there needs to be a certain difference in age between the father and the child. Third, the child needs to agree to the acknowledgement if it is already an adult. Fourth, the man needs to confirm that the child is not the offspring from an illicit relationship.⁸⁵ Art. 160 ff. *Moudawana* are applicable for the acknowledgement in Morocco. Only a man can acknowledge paternity, which has to be proven by an official certificate or by an unquestionable and irrefutable handwritten statement of the man.⁸⁶ It seems quite unjust that in such cases the parentage is solely dependent on the decision of the father, who can then easily free himself of any responsibility by not acknowledging a child, whereas the mother (or the child) cannot file a paternity suit.⁸⁷

3. Through evidence ('*al-bayyinah*')

A third method to grant lineage to a child is through evidence either by legal notaries or by a specific number of Muslims.⁸⁸ The general Sunni rule indicates that in order to prove paternity the witnesses can either be two men or one man and two women, whereas the Shias only

⁸⁰ Art. 155 *Moudawana*; NASIR, *supra* n. 34, at 149; NASIR, Status of Women, *supra* n. 34, at 174.

⁸¹ Art. 156 *Moudawana*; FOBLETS/CARLIER, *supra* n. 35, at 82; WELCHMANN, *supra* n. 39, at 145.

⁸² WELCHMANN, *supra* n. 39, at 145.

⁸³ FOBLETS/CARLIER, *supra* n. 35, at 83.

⁸⁴ BARGACH, *supra* n. 5, at 60; NASIR, *supra* n. 34, at 150 ff.; NASIR, Status of Women, *supra* n. 34, at 175 ff.; PEARL/MENSKI, *supra* n. 63, at 400, M. 10-08.

⁸⁵ BARGACH, *supra* n. 5, at 60; NASIR, *supra* n. 34, at 151; NASIR, Status of Women, *supra* n. 34, at 176.

⁸⁶ See also NASIR, *supra* n. 34, at 152; NASIR, Status of Women, *supra* n. 34, at 177.

⁸⁷ Pointed out also by MONJID, *supra* n. 35, at 145, 147.

⁸⁸ BARGACH, *supra* n. 5, at 60; NASIR, *supra* n. 34, at 153; NASIR, Status of Women, *supra* n. 34, at 178.

accept two men.⁸⁹ Art. 158 *Moudawana* declares that, in Morocco, paternity can be established by two public notaries or by oral testimony.

4. Through comparison of physical characteristics ('*al-qyāfa*')

A traditional but less frequent and less reliable method is to compare physical characteristics between a child and its alleged father. This is done only in severe or urgent cases and, even though it is accepted as a proof of *nasab*, it is not generally favoured.⁹⁰ The Hanafi school does not accept this method to prove paternity.⁹¹ In principle, any physical characteristics can be compared, although a comparison of the feet is generally practiced.⁹² The reason behind this is the story of Zayd bin Haritha and his son Usama.⁹³ The Prophet Muhammad had to determine the paternity of Zayd and his son and it is said that Muhammad covered the heads of the two men and only looked at their feet. The similarities and physical resemblances then proved the kinship between Zayd and Usama.

5. Through Adoption?

Adoption is a judicial process in which the legal obligations and rights of a child toward the biological parents are terminated and new rights and obligations are created between the child and the adoptive parents at the time of the conclusion. A fictional blood link is established. The legal relationship results in the adoptee taking the adopters name as well as becoming the legal heir of the adopter. Any legal rights with the natural parents are terminated and the lineage is extinguished.⁹⁴ In the Qur'ān you find different stories about children who were adopted or fostered by parents other than their biological parents. The Prophet Muhammad for example was an orphan (in the Islamic sense) with a mother who could not raise him, wherefore Muhammad was taken in as an infant by a foster mother, who nursed and raised him.⁹⁵ Later in his life Prophet Muhammad himself adopted a former slave named Zaid and raised him like his own son.⁹⁶

Adoption has always been an important topic in Islam and its history. In the so-called '*Jāhiliyyah*' period, in the pre-Islamic Arabia, adoption was common and widely practiced.⁹⁷ Society then was organized in tribes and clans and, the larger a clan was, the more important it was within the tribe, and the bigger a tribe was, the stronger it was in competition with other tribes.⁹⁸ Therefore, adoption of mainly boys had the important function of increasing the size of a clan and was done for socioeconomic reasons to obtain human capital and to consolidate the

⁸⁹ NASIR, *supra* n. 34, at 153; NASIR, Status of Women, *supra* n. 34, at 178.

⁹⁰ BARGACH, *supra* n. 5, at 60.

⁹¹ SONBOL, *supra* n. 38, at 54.

⁹² BARGACH, *supra* n. 5, at 60.

⁹³ See SONBOL, *supra* n. 38, at 54.

⁹⁴ Referring to definitions on <http://legal-dictionary.thefreedictionary.com/adoption>, last accessed 2 November 2015; <https://www.law.cornell.edu/wex/adoption>, last accessed 2 November 2015.

⁹⁵ For a summary of the story of Prophet Muhammad see ARSHAD, *supra* n. 6, at 171 ff., M. 9.2.2.

⁹⁶ The story of Prophet Muhammad and Zayd bin Haritha, later called Zayd bin Muhammad (bin meaning son of) in ARSHAD, *supra* n. 6, at 174, M. 9.2.3.

⁹⁷ NASIR, *supra* n. 34, at 153; NASIR, Status of Women, *supra* n. 34, at 180; SONBOL, *supra* n. 38, at 46.

⁹⁸ BARGACH, *supra* n. 5, at 47 referring to Robertson Smith's work *Marriage and Kinship in Early Arabia* (New York 1956); SONBOL, *supra* n. 38, at 46.

tribe's military strength.⁹⁹ Concerning inheritance, adoption did not cause any problems at that time as the tribal grounds were the property of the entire tribe; private ownership of the land did not exist.¹⁰⁰ As a consequence, it was important to have enough men in your tribe in order to preserve its patrimony since the clans were patriarchal and patrilineal in their structure, which means that everything was passed through the adult male link; women were not allowed to inherit.¹⁰¹ However, in the sixth century, the tribal system started to disappear and the period of trade, merchants and exchange began.¹⁰² The social structure was transformed as the tribes were replaced by the nuclear family as the basic unit of society.¹⁰³ In the early seventh century, when Mecca was already an important commercial center, the Prophet received the revelations from God, which were first transmitted orally and eventually 'codified' as the Qur'ān.¹⁰⁴ With the coming of the Islam novel inheritance rules (as well as regulations regarding the family law in general) were introduced.¹⁰⁵ Whether these changes happened as a reaction to the breakdown of the tribal system, whether they were specifically directed towards bringing about a new order or whether they were the logical consequences of the new social structure is not clear.¹⁰⁶ The ties within the nuclear family became more important and the goal was to keep more of the inheritance within the nuclear family as well as to strengthen the legal status of the women by entitling them to inherit.¹⁰⁷ The blood tie within the nuclear family became the crucial criterion in order to keep property and wealth within the close family, wherefore the heirs nearest in degree and heirs of full blood were prioritized as well as formal adoption was forbidden.¹⁰⁸ The focus of the Quranic laws lay on the distribution of property and wealth rather than strengthening clan structures, which also the strong connection between family matters and inheritance issues show.¹⁰⁹ Since inheritance also strongly depended on *nasab* and blood relationships, various rules were enacted to ensure the purity of *nasab*. Apart from the prohibition of adoption, which could result in a confusion of *nasab*, also the 'idda' (waiting period) and the dress code and moral code (covering the female body, lowering the gaze)¹¹⁰ belonged to the measures designed to enshrine *nasab*.¹¹¹ The central and only verses in the Qur'ān directly concerning adoption are the following:

⁹⁹ BARGACH, *supra* n. 5, at 47; POWERS DAVID STEPHAN, The Islamic Inheritance System: A Socio-Historical Approach, in: Baderin Mashood A. (Ed.), Issue in Islamic Law, Volume II, Surrey 2014, 165–181, at 165; SONBOL, *supra* n. 38, at 46.

¹⁰⁰ SONBOL, *supra* n. 38, at 46.

¹⁰¹ POWERS, *supra* n. 99, at 165 f.; RAHMAN M. HABIBUR, The Role of Pre-Islamic Customs in the Islamic Law of Succession, in: Baderin Mashood A., Issue in Islamic Law, Volume II, Surrey 2014, 147 – 163, at 147.

¹⁰² SONBOL, *supra* n. 38, at 47.

¹⁰³ POWERS, *supra* n. 99, at 166.

¹⁰⁴ ESPOSITO JOHN L., The Oxford Encyclopedia of the Modern Islamic World, Volume 3, LIEBE-SARE, New York 1995, at 385f.

¹⁰⁵ POWERS, *supra* n. 99, at 166; SONBOL, *supra* n. 38, at 47.

¹⁰⁶ POWERS, *supra* n. 99, at 166; SONBOL, *supra* n. 38, at 47.

¹⁰⁷ ESPOSITO JOHN L., The Oxford Encyclopedia of the Modern Islamic World, Volume 2, FAQI-LEBA, New York 1995, at 203; POWERS, *supra* n. 99, at 166; RAHMAN, *supra* n. 101, at 147 f.

¹⁰⁸ ESPOSITO, *supra* n. 107, at 203; RAHMAN, *supra* n. 101, at 161.

¹⁰⁹ SONBOL, *supra* n. 38, at 48.

¹¹⁰ Qur'ān 14:30-31: "Say to the believing men that they should lower their gaze and guard their modesty, that will make for greater purity for them. And God is well-acquainted with all that they do. And say to the believing women that they should lower their gaze and guard their modesty, that they should not display their beauty and ornaments except what (must ordinarily) appear thereof." as translated in SONBOL, *supra* n. 38, at 49.

¹¹¹ SONBOL, *supra* n. 38, at 49.

“God has not made a man with two hearts in one body; nor has He made your wives – whom you declare (meaning divorce, A/N) “as unlawful to you as your mother’s bodies”; nor has He made your adopted sons your sons. Such are only figures of speech invented by your mouths, whereas God speaks the Truth to you and indicates the True Path.

Call your adopted sons by their fathers’ names – for this is the most just way according to God – and if you do not know their fathers’ names, then call them your brothers in faith or your protected wards. But there shall be no sin upon you should you make a mistake in this matter, for it is what your hearts intend that counts; and God is merciful and forgiving.”¹¹²

The question whether the verses truly forbid adoption, remains a controversial subject.¹¹³ Nonetheless, these verses are used to explain and defend the interdiction of so-called plain adoption, and since then adoption has not been recognized and considered to be a sin in Islamic law and society.¹¹⁴ Adoption is even seen as a dangerous practice since it can lead to a confusion of blood and veils the real background of a person, its *nasab* and *asl*. It is not in the interest of the family to give a name and a share of the estate to a stranger.¹¹⁵ Therefore, through adoption of a child it is not possible to establish lineage-*nasab* to the adopting father.¹¹⁶ In Morocco, art. 149 *Moudawana* states that adoption has no legal value and it results in no legal effects of legitimate filiation. This is not actually a prohibition, but it declares adoptions to be null and void.¹¹⁷

On the other hand, nobody would contradict the fact that adoption exists within Islamic societies. Even though adoption is legally not allowed, it has always been practiced after the Islam was introduced to the Arabs.¹¹⁸ There have always been women who have given birth to an unwanted child or a child they were not able to look after, and at the same time there have been women or families who could not have a child. Yet, for financial security and continuity of the family it was important to have children.¹¹⁹ This fact in itself made it inevitable that (secret) adoptions would take place during all these years. Also, the Islamic belief and law have had an influence on miscellaneous practices of adoption, even though plain adoption is prohibited. This is because Islamic law does not ignore orphans or illegitimate children in general, but it requires that the same treatment be offered to them as to children with known

¹¹² Qur’ān 33:4-5 as translated in AWDE NICHOLAS, *Women in Islam: An anthology from the Qur’ān and Hadīths*, London 2005, at 160.

¹¹³ PEARL/MENSKI, *supra* n. 63, at 408, M. 10-26; SONBOL, *supra* n. 38, at 51.

¹¹⁴ See i.a. BÜCHLER, *supra* n. 36, at 57; NASIR, *supra* n. 34, at 153; NASIR, *Status of Women*, *supra* n. 34, at 180; SONBOL, *supra* n. 38, at 51.

¹¹⁵ RUGH ANDREA B., *Orphanages in Egypt: Contradiction or Affirmation in a Family-Oriented Society*, in: Warnock Elizabeth (Ed.), *Children in the Muslim Middle East*, Austin 1995, 124 – 141, at 133.

¹¹⁶ Confirming this ALAOUI, *supra* n. 61, at 33.

¹¹⁷ In Algerian law adoption is explicitly forbidden (Art. 46 of the Algerian Act No. 84/1984).

¹¹⁸ BARGACH, *supra* n. 5, at 5, 27; SONBOL, *supra* n. 38, at 57, 60.

¹¹⁹ BARGACH, *supra* n. 5, at 163 f.

filiation.¹²⁰ It even is a religious duty and a communal responsibility to take care of a foundling, to support children, orphans and those in need in general.¹²¹

Another form is the legal guardianship, or so-called '*kafala*', translated as the gift of care.¹²² It is the official Islamic principle of fosterage. A child taken into *kafala* is entitled to similar rights as a natural child, such as maintenance, education, financial protection and also moral and physical protection, and the parental authority is given to the new family.¹²³ Although this might sound very similar to plain adoption, the difference lies in the *nasab* because between the new family and the child taken into *kafala*, parentage cannot be established for it can not be a substitute for lineage by blood.¹²⁴ This also means that the child cannot take the name of the new family nor has it any right to inherit, but the legal ties remain with the biological family (if known).¹²⁵

Despite the prohibition of adoption enshrined in the Shari'ah, not all Muslim countries obey this religious ruling. Many countries do not explicitly regulate it in their national codes, and some countries, such as Turkey,¹²⁶ Tunisia,¹²⁷ or Somalia,¹²⁸ even allow adoption subject to certain conditions.

IV. The rights of the illegitimate child

The family in Islam, which is the center of the social organization, is traditionally paternalistically structured.¹²⁹ The father holds the authority and responsibility, the natural guardianship over his family is appointed to him and he gives his name to the children, whereby they follow his lineage.¹³⁰ A father is responsible for his children and must provide them with food, clothing, shelter, etc. until a son reaches maturity and until a daughter is married, after which her husband henceforward is responsible.¹³¹ By law, the mother only has temporary rights over her children, which are limited to birth and nursing, to meet the physical needs of a child. However, in reality the responsibilities of the mother often exceed this limited

¹²⁰ ALAOUI, *supra* n. 61, at 33.

¹²¹ BARGACH, *supra* n. 5, at 61 f.; NASIR, *supra* n. 34, at 155; NASIR, Status of Women, *supra* n. 34, at 178; ALISHAHEEN SARDAR, A Comparative Perspective of the Convention on the Rights of the Child and the Principles of Islamic Law: Law Reform and Children's Rights in Muslim Jurisdictions, in: Protecting the World's Children: Impact of the Convention on the Rights of the Child in diverse Legal Systems/UNICEF, New York 2007, at 153 f., 157.

¹²² BARGACH, *supra* n. 5, at 28 f.; SCHIRRMACHER/SPULER-STEGEMANN, *supra* n. 66, at 194 f.; WELCHMANN, *supra* n. 39, at 148.

¹²³ ARSHAD, *supra* n. 6, at 170, M. 9.1; BARGACH, *supra* n. 5, at 29; WELCHMANN, *supra* n. 39, at 148.

¹²⁴ ARSHAD, *supra* n. 6, at 170, M. 9.1; BARGACH, *supra* n. 5, at 42; WELCHMANN, *supra* n. 39, at 148.

¹²⁵ Art. 2 Abandoned Children Act: Dahir N° 1-02-172 du 1 Rabii II 1423 portant promulgation de la Loi N° 15-01 relative à la prise en charge (la *kafala*) des enfants abandonnés. (B.O du 5 septembre 2002); also ARSHAD, 170, M. 9.1; WELCHMANN, 148.

¹²⁶ Art. 305 ff. of the Turkish Civil Code; SCHIRRMACHER/SPULER-STEGEMANN, *supra* n. 66, at 194 f.

¹²⁷ Tunisian Law No. 27/1958 with different provisions regulating adoption. BÜCHLER, *supra* n. 36, at 58; NASIR, *supra* n. 34, at 153 f.; NASIR, Status of Women, *supra* n. 34, at 180.

¹²⁸ Art. 110 ff. of the Somalian Family Law 1975; PEARL/MENSKI, *supra* n. 63, at 409, M. 10-27.

¹²⁹ BARAKAT HALIM, The Arab Family and the Challenge of Social Transformation, in: Warnock Elizabeth (Ed.), Women and the Family in the Middle East, New Voices of Change, Austin 1985, 27 – 48, at 27, 31.

¹³⁰ BARAKAT, *supra* n. 129, at 27, 31; TUCKER, *supra* n. 6, at 29.

¹³¹ POWERS DAVID STEPHAN, The Development of Islamic Law and Society in the Maghrib, Qādīs, Muftīs and Family Law, Farnham/Burlington 2011, at 178.

scope.¹³² This is the normal situation of a family if the father and mother are married and their children were born in wedlock and are therefore legitimate. However, as mentioned earlier, if a child is born outside of wedlock and is not acknowledged, nor its legitimacy proven, the child is illegitimate. No paternity can be established, there is no lineage-*nasab* – father and child are legally not related. The father is not obliged to support his child and the child has therefore no claims against his biological father because only through a legal relationship to his father are the child's rights secured.¹³³ In such cases it is the mother who must provide for the child.¹³⁴ The following will outline the general rights of a child and in particular what consequences the status of illegitimacy has for a child concerning these rights. Art. 54 *Moudawana* lists the rights guaranteed to children in Morocco.

1. Name and Nationality

Art. 54 para. 2 *Moudawana* states that it is the right of every child that the parents ensure respect of the child's identity and its preservation, particularly the child's name, nationality and registration in the civil status record. To give a name to something existing is considered as giving form to it, and only by giving a name is a newborn made into a "social being". It is like a second birth.¹³⁵ The surname indicates who your father is and defines your *nasab* (but does not create *nasab*).¹³⁶ As illegitimate children legally do not have a father, they cannot receive his surname. However, since the existence of the civil register in Morocco, which was introduced by the French in the early twentieth century, the law states that, within one month after birth, all children have to be registered, whether they are "normal", foundlings or illegitimate children, and must also be given a last name.¹³⁷ On these grounds, a foundling brought to a shelter will be given a name (and also fictitious place and date of birth, fictitious names of mother and father) by the police or a social worker working in the shelter, with the last name chosen from an official list of last names.¹³⁸ As for a natural child who has a mother, the child can be given the mother's name on condition that her family gives the written permission to do so.¹³⁹ The right of a mother to register her child and to give her name is enshrined in art. 16 of the Moroccan Civil Status Act.¹⁴⁰ What stands out in this provision is the fact that it has to be indicated that the name was chosen (the name must begin with 'Abd').¹⁴¹ However, this can already be considered a significant improvement compared to the situation before 1992 when the child could only be given two first names instead of a first and a last name (fictitious or the mother's name) and, even worse, their birth certificate had to indicate 'ibnu zinā', meaning

¹³²MERIWETHER MARGARET, The Rights of Children and the Responsibilities of Women, Women and Wasis in Ottoman Aleppo, 1770 – 1840, in: Sonbol Amira El-Azhary (Ed.), Women, the Family, and Divorce in Islamic History, Syracuse 1996, 219 – 235, at 233 f.; TUCKER, *supra* n. 6, at 29.

¹³³ALAOUI, *supra* n. 61, at 34, 36.

¹³⁴ALAOUI, *supra* n. 61, at 34.

¹³⁵BARGACH, *supra* n. 5, at 104, 107 f.

¹³⁶ARSHAD, *supra* n. 6, at 176, M. 9.3.1; BARGACH, *supra* n. 5, at 112, 118.

¹³⁷BARGACH, *supra* n. 5, at 112 f.

¹³⁸BARGACH, *supra* n. 5, at 113; SONBOL, *supra* n. 38, at 61.

¹³⁹BARGACH, *supra* n. 5, at 113 f., 117 f.; BARGACH indicates that in most cases the woman does not get the permission of her family and therefore a last name will also be chosen from the list. Dr. Nadia Sonneveld confirmed this fact in the personal interview of the author with Dr. Sonneveld (see n. 219).

¹⁴⁰Loi N° 37-99 relative à l'état civil, promulguée par le Dahir N° 1-02-239 du 25 Rejeb 1423 (3 Octobre 2002) (Civil Status Act).

¹⁴¹WILLMAN/KOUZZI, *supra* n. 7, at 5.

child of adultery.¹⁴² Yet, in order to register a child or to receive a family booklet, the most essential document in Moroccan's lives,¹⁴³ the mother needs to bring forward a birth attestation of the child and also a birth certificate for herself as well as a copy of the marriage certificate.¹⁴⁴ One can imagine that it would be extremely difficult for a mother to obtain these documents because often her birth certificate is with her family, which might have disowned her due to her 'sinful behavior', or the family might live far away in a more rural area. In addition, these procedures bear high costs for an impecunious woman and take a long time (three to eight months).¹⁴⁵ The new Civil Status Act clearly entitles a mother to register a child. However, the question whether an unwed woman can also obtain a family booklet is not regulated and therefore the practice among Civil Status Officers is different.¹⁴⁶ Moreover, it is reported that women were often humiliated when trying to register their child and they were in constant fear that the police would be called since they had committed a crime.¹⁴⁷ For these reasons, it is not surprising that many mothers still do not register their illegitimate child. An improvement however was made with the enactment of the new Nationality Code.¹⁴⁸ Art. 6 of the Nationality Code stipulates that Moroccan citizenship is given to a child born to a Moroccan woman and, thus, it is not necessary to have filiation to a Moroccan father. As indicated above it is prohibited and considered a sin to give a child taken into *kafala* the name of its fostering family, since this would create the fiction of lineage and result in an illegal plain adoption.¹⁴⁹ If a child is taken into *kafala* it will keep its name whether it is a fictitious name given by the police or whether it is the name of the known natural parents.¹⁵⁰

2. Fosterage

After the establishment of paternity, the first right of a child after birth concerning its physical needs is breastfeeding ('*rada*').¹⁵¹ Art. 54 para. 4 *Moudawana* states that the child has a right to be suckled by the mother whenever possible. Suckling is generally a religious obligation of the mother and it is the father's duty to ensure the suckling of the child if necessary by hiring a wet nurse.¹⁵² If a woman other than the mother breastfeeds the child (whether because it has no mother or because the mother cannot, or is not willing to, suckle), paternity cannot be established. However, it results in a similar legal relationship between the child and the fosterage mother. Between the child and the fosterage mother, along with her husband and children, the marriage impediments arise, however no right to inherit from the fosterage

¹⁴²BARGACH, *supra* n. 5, at 114.

¹⁴³WILLMAN/KOUZZI, *supra* n. 7, at 5. It is e.g. needed in order to get a National Identity Card or driver's license, as a proof of identity to get a job, to get married or to be admitted to a hospital. It is proof for legal existence.

¹⁴⁴WILLMAN/KOUZZI, *supra* n. 7, at 4, 12 f.

¹⁴⁵WILLMAN/KOUZZI, *supra* n. 7, at 12, 18.

¹⁴⁶WILLMAN/KOUZZI, *supra* n. 7, at 5 ff.

¹⁴⁷WILLMAN/KOUZZI, *supra* n. 7, at 11 f.

¹⁴⁸Dahir N° 1-58-250 du 21 Safar 1378 (6 Septembre 1958) portant Code de la Nationalite Marocaine tel que modifie et complete par la Loi N° 62-062 promulgue par le Dahir N° 1-07 du 03 Rabii I 1428 (23 Mars 2007) (Nationality Code).

¹⁴⁹BARGACH, *supra* n. 5, at 104; SONBOL, *supra* n. 38, at 62.

¹⁵⁰SONBOL, *supra* n. 38, at 61.

¹⁵¹Indicated by Qur'an 2:233: "The mothers shall give suck to their offspring for two whole years..." (translated by SYED MOHAMED ALI, *The Position of Women in Islam: A Progressive View*, Albany 2004, at 77) as well as the previously mentioned verses 31:14 and 46:15; BARGACH, *supra* n. 5, at 69; NASIR, *Status of Women*, *supra* n. 34, at 183.

¹⁵²BARGACH, *supra* n. 5, at 69; NASIR, *Status of Women*, *supra* n. 34, at 183 f.

parents will arise.¹⁵³ Milk, therefore, can create kinship but not inheritance for inheritance can only be passed through blood.¹⁵⁴

3. Custody and guardianship

Classical Islamic law recognizes two types of guardianship known as '*Al-Hadāna*' ('guardianship of the infant') and '*Al-Wilāya*' ('guardianship of education/morality/spirituality and money/property').¹⁵⁵ Whoever is appointed guardian of a child must do the utmost to take care of the child and act in its best interest concerning the child's physical and emotional health, education and wealth.¹⁵⁶

The English terms custody and guardianship do not exactly correspond with the two types in Islamic law. However, often *Al-Hadāna* is referred as custody or nurturing and embracing because it means the personal physical care during the first years in life of a minor, which is why *Al-Hadāna* is traditionally appointed to the mother.¹⁵⁷ On the other hand, *Al-Wilāya* can be seen as guardianship, since they deal with legal rights of the father concerning education, religion, finances and all other fields where the ward encounters the world outside of home.¹⁵⁸

For illegitimate children, there is no parentage established to a father. Thus, the child does not have a natural guardian. Concerning the *Al-Hadāna*, it is recognized that for an illegitimate child it would always belong to the mother even after the *Al-Hadāna* period until the child can be responsible for itself.¹⁵⁹ As for guardianship, it is usually also the mother who is appointed as *walī* since she naturally has the closest relationship to the child. Therefore, it is the mother who is responsible for the property, maintenance and also marriage of the illegitimate son or daughter.¹⁶⁰ However, since guardianship can also be appointed by a court or by testament and is not as closely linked to paternity as, for example, the right of inheritance, it would be possible to appoint the biological father of an illegitimate child as a guardian even though paternity cannot be established, assuming that the real father is known and willing to be the guardian of his illegitimate child. Regarding abandoned children who have neither mother nor father, it is the state that has to act as a guardian (*walī*) and appoints a legal tutor.¹⁶¹ If such children are taken in by fostering parents, it becomes their responsibility as it is considered a religious duty to ensure the upbringing of a child.¹⁶² Basically, a guardian can be any man or woman meeting the compulsory criteria and must not necessarily be a relative by blood.¹⁶³

¹⁵³ ARSHAD, *supra* n. 6, at 178, M. 9.3.3; BARGACH, *supra* n. 5, at 69.

¹⁵⁴ BARGACH, *supra* n. 5, at 137 f.

¹⁵⁵ Where *Al-Wilāya* can be divided into '*Wilāya al māl*' related to the management of the financial affairs of the child (property, goods, money) and '*Wilāya al-nafs*' regarding the marriage of the girl but also the education, morality and spirituality of the child (*in NASIR* also called '*Wilayah at-Tarbiyah*'), ARSHAD, *supra* n. 6, at 152, M. 8.3; BARGACH, *supra* n.5, at 69; NASIR, Status of Women, *supra* n. 34, at 186.

¹⁵⁶ ARSHAD, *supra* n. 6, at 152.

¹⁵⁷ BARGACH, *supra* n. 5, at 69; BÜCHLER, *supra* n. 36, at 58; NASIR, Status of Women, *supra* n. 34, at 186; PEARL/MENSKI, *supra* n. 63, at 410 f., M. 10-32 ff.

¹⁵⁸ WELCHMANN, *supra* n. 39, at 133.

¹⁵⁹ SYED, *supra* n. 151, at 80.

¹⁶⁰ MERIWETHER, *supra* n. 132, at 228, 232 f.; TUCKER, *supra* n. 6, at 147, 156.

¹⁶¹ BARGACH, *supra* n. 5, at 42.

¹⁶² BARGACH, *supra* n. 5, at 61; NASIR, *supra* n. 34, at 155; NASIR, Status of Women, *supra* n. 34, at 178.

¹⁶³ BARGACH, *supra* n. 5, at 69.

Art. 163 to 179 *Moudawana* deal with the upbringing of a child, which today is the shared responsibility of both parents as long as they are married (art. 164).¹⁶⁴ Custody must be guaranteed to the child up to his or her legal majority (art. 166). If the child has reached the age of fifteen, he or she is free to decide himself or herself who will be the custodian (art. 166). The autonomy of decision is also given to a child without parents who, according to art. 166 *Moudawana*, can choose a custodian from the relatives provided that the legal tutor of the child gives his permission. Otherwise, it is the court that has to settle the matter taking into consideration the child's best interest (art. 166).

Art. 236 *Moudawana* states that by law it is the father who is the tutor of his children unless he is disqualified by judicial order. Art. 229 ff. *Moudawana* deal with the legal representation of a child. Art. 230 and 231 *Moudawana* list the possible legal guardians as well as in which order they are to be appointed. First, it is the father who is the legal representative, and in his absence the mother. The aforementioned articles make it clear that it is the father who is the natural legal guardian of the child. Afterwards, it can be a testamentary guardian appointed by the father or, if none is appointed by the father, then by the mother, and only then does the state become responsible. It can either be a judge who acts as a legal representative or, as a last possibility, the court may appoint a legal tutor.

4. Maintenance

The maintenance of a child is in general solely the father's duty even if the mother is wealthy.¹⁶⁵ It is the man's responsibility to pay for the child's support, including food, clothing, shelter, medicine, education and also wages given to the custodian (custodian woman or custodian mother).¹⁶⁶ This is also stipulated in art. 167 *Moudawana*. The maintenance generally lasts until the children are able to pay for their own expenses, i.e. generally for a boy until puberty or majority and for a girl until she gets married and her husband is financially liable for her.¹⁶⁷ Moroccan law awards children the right of maintenance until they are of legal age or if they are still in education up to the age of twenty-five (art. 198). New to the Moroccan law is that the mother is also responsible for the maintenance of the child if the father is unable to pay and provided that the mother is affluent.¹⁶⁸

Art. 187 *Moudawana* states that financial maintenance is only due for reasons of marriage, kinship or commitment. As an illegitimate child is not legally related to the father, the father is also not bound to pay maintenance. However, if the child has a known mother it will be her duty to provide maintenance since art. 197 *Moudawana* obliges both parents to pay for the children. This is also due to art. 199, which states that it is the mother's duty to pay if the father is unable to. A child without any parents must provide for itself provided that it has its own

¹⁶⁴ See also NASIR, Status of Women, *supra* n. 34, at 189.

¹⁶⁵ ABDAL-RAHMAN ABDAL-REHIM ABDAL-REHIM, The Family and Gender Laws in Egypt during the Ottoman Period, in: Sonbol Amira El-Azhary (Ed.), Women, the Family, and Divorce in Islamic History, Syracuse 1996, 96 – 111, at 108; BÜCHLER, *supra* n. 36, at 61; PEARL/MENSKI, *supra* n. 63, at 430, M. 10-84; ROHE MATHIAS, Das Islamische Recht: Geschichte und Gegenwart, 3. Edit., München 2011, at 97.

¹⁶⁶ NASIR, Status of Women, *supra* n. 34, at 198 f.; ABDAL-RAHMAN ABDAL-REHIM, *supra* n. 165, at 108; see also art. 167 and 168 *Moudawana* and art. 189 *Moudawana* describing what maintenance shall include.

¹⁶⁷ BÜCHLER, *supra* n. 36, at 61; PEARL/MENSKI, *supra* n. 63, at 430, M. 10-84; POWERS, *supra* n. 131, chapter III, at 178; ROHE, *supra* n. 165, at 98.

¹⁶⁸ Art. 199 *Moudawana*; see also ROHE, *supra* n. 165, at 228.

resources. A legal guardian can use the child's property to pay for its expenses.¹⁶⁹ If a minor has no financial means, it is the legal tutor's responsibility to ensure the child's maintenance. As seen earlier, it is the responsibility of the fostering parents also to provide maintenance if they take a child into *kafala*.¹⁷⁰

5. Inheritance

Inheritance is not a birthright in Islamic law, i.e. the right of an heir only comes into being at the time of death of the bequeather and the heir is not entitled to any estate of his ancestor at any time before.¹⁷¹ One intention of inheritance is to split property, permitting the distribution of wealth amongst generations and preventing individuals from amassing property.¹⁷² In order to do so, Islamic law divides the heirs into different classes.¹⁷³ Only relatives with a legitimate blood relationship to the deceased are entitled to inherit.¹⁷⁴ It is *nasab* (lineage) which decides who will inherit and who will be left out.¹⁷⁵ Therefore, it is not surprising that an illegitimate child is not entitled to succeed from its biological father. The state of illegitimacy leads to total exclusion from inheritance.¹⁷⁶ For the Shias, an illegitimate child is even a '*nullus filius*' (the son of no one), and hence cannot be an heir of either the father or the mother.¹⁷⁷ Unlike the Shia law, the Hanafi law awards the illegitimate child the right to inherit from the mother and her relatives. Reciprocally, the mother and her relatives can also be successors of the child.¹⁷⁸

As seen above, if a child is taken into *kafala* the right of inheritance cannot be established since there is no blood lineage. However, the fostering parents still remain responsible for the financial needs of the "adopted" child in the same way as they have to look after their own natural children during the lifetime of the parents as well as after their death.¹⁷⁹ This can be done by means of a gift ('*hiba*') or a bequest ('*wasiyah*').

Islamic inheritance law has many compulsory rules and hence is quite inflexible and complex.¹⁸⁰ As a result, jurists created a system of legal means, specifically the law of gifts, through which people could be more flexible in their property and estate planning.¹⁸¹ Gifts can either be made *inter vivos* or *post mortem*. For an endowment during lifetime, Islamic law knows no restriction on the size of such gifts and they take immediate effect. However, an *inter vivos*

¹⁶⁹ As a result of art. 187 *Moudawana*.

¹⁷⁰ BARGACH, *supra* n. 5, at 29.

¹⁷¹ KHAN HAMID, *The Islamic Law of Inheritance: A comparative study of Recent Reforms in Muslim Countries*, Karachi 2007, at 39; POWERS, *supra* n. 131, chapter III, at 180; POWERS, *supra* n. 131, chapter VIII, at 5.

¹⁷² POWERS, *supra* n. 131, chapter III, at 179; SONBOL, *supra* n. 38, at 50.

¹⁷³ KHAN, *supra* n. 171, at 70, 118.

¹⁷⁴ ARSHAD, *supra* n. 6, at 187 f., M. 10.4.

¹⁷⁵ SONBOL, *supra* n. 38, at 48.

¹⁷⁶ KHAN, *supra* n. 171, at 47 f.

¹⁷⁷ KHAN, *supra* n. 171, at 51.

¹⁷⁸ KHAN, *supra* n. 171, at 51; ALAOUI, *supra* n. 61, at 33.

¹⁷⁹ ARSHAD, *supra* n. 6, at 177 f., M. 9.3.2, 187, M. 10.4; Also SONBOL indicates that even though an adopted child is not allowed to inherit it must financially be provided for and supported and therefore Muslims should leave part of their wealth to the orphan (in general one should leave something for those who are dependent). SONBOL, *supra* n. 38, at 50.

¹⁸⁰ POWERS DAVID STEPHAN, *The Islamic Inheritance system: A Socio-Historical Approach*, in: Mallat Chibli/Connors Jane (Eds.), *Islamic Family Law*, London/Dordrecht/Boston 1990, 11-30, at 16 ff., 19; POWERS, *supra* n. 131, chapter IV, 5.

¹⁸¹ POWERS, *supra* n. 180, at 19.

gift cannot be revoked and the proprietor must really divest himself of the ownership.¹⁸² Gifts *post mortem* can be created in a last will or testament and takes effect only upon the donor's death.¹⁸³ However, such a bequest must not be given to anyone who qualifies as an heir and it must not exceed the amount of one-third of the deceased's net estate, i.e. after debts and costs of the funeral have been paid.¹⁸⁴ Considering this, it is possible that illegitimate children can be considered and be placed in a position similar to an heir through the means of a gift or a bequest.¹⁸⁵

V. The influence of the UN Convention on the Rights of the Child

Morocco signed the United Nations Convention on the Rights of the Child (henceforward CRC) in 1990 and in 1993 it was ratified.¹⁸⁶ This was at the time that the first small changes were being implemented to the Moroccan law and it was another indication of the increasing awareness and concerns about women's rights and human rights in general. The signing of the CRC was not only a gain for children but also for their mothers and all women, as the rights of children and the rights of women are inherently linked. If a girl is guaranteed equal rights from birth until adulthood, equal rights for her as a woman will automatically follow.¹⁸⁷ Moreover, certain guarantees for a child will ensure coherent rights to the mother such as custody, access to the child, maternity leave, etc. Like most other Muslim states, which all are members of the CRC, Morocco made a reservation to art. 14 CRC concerning the child's right to freedom of thought, conscience and religion.¹⁸⁸ However, this reservation was removed by the government in 2005.¹⁸⁹ The worldwide acceptance of the CRC is also due to the fact that, during its development, a wide range of different interest groups (member states, NGOs) was represented in the working group. It was not primarily the West that designed it and the convention explicitly refers to Islamic law (art. 20 CRC).¹⁹⁰ After the ratification of the CRC Morocco had to take a number of measures to ensure the implementation of the Convention. Also regarding children born out of wedlock, steps were necessary as their treatment by the

¹⁸² POWERS, *supra* n. 180, at 20; POWERS, *supra* n. 131, chapter III, at 180; POWERS, *supra* n. 131, chapter IV, at 5; POWERS, *supra* n. 131, chapter IX, at 382.

¹⁸³ POWERS, *supra* n. 131, chapter IV, at 5; POWERS, *supra* n. 131, chapter IX, at 382.

¹⁸⁴ ARSHAD, *supra* n. 6, at 190, M. 10.5; BARGACH, *supra* n. 5, at 69; EBERT HANS-GEORG, Das Erbrecht arabischer Länder, Leipziger Beiträge zur Orientforschung, Band 14, Frankfurt am Main 2004, at 14; POWERS, *supra* n. 180, at 23; POWERS, *supra* n. 131, chapter IV, at 5; POWERS, *supra* n. 131, chapter IX, at 382.

¹⁸⁵ BARGACH, *supra* n. 5, at 69.

¹⁸⁶ Save the Children Sweden, Regional Office for the Middle East and North Africa / International Bureau for Children's Rights / Bayti Association: Country Profile of Morocco, A review of the implementation of the UN Convention of the Rights of the Child, Beirut/Montreal/Casablanca 2011, available at: <http://resourcecentre.savethechildren.se/sites/default/files/documents/5151.pdf>, last accessed 27 September 2015 (*cit.* Country Profile, ...), at 17.

¹⁸⁷ ALI stressing this linkage with reference to the United Nations World Conference on Human Rights in Vienna in 1993 and the World Conference on Women in Beijing in 1995 where women's rights were at the center of attention and this linkage was equally enhanced. ALI SHAHEEN SARDAR, Gender and Human Rights in Islam and International Law, Equal before Allah, unequal before him?, Den Haag/London/ Boston 2000, at 216 f.

¹⁸⁸ Country Profile, *supra* n. 186, at 19; HASHEMI KAMRAN, Religious Legal Traditions, International Human Rights Law and Muslim States, Leiden/Boston 2008, at 220; WELCHMANN, *supra* n. 39, at 140.

¹⁸⁹ Country Profile, *supra* n. 186, at 19.

¹⁹⁰ HASHEMI, *supra* n. 188, at 220.

law was at odds with the principles of the CRC.¹⁹¹ In 1998, Morocco established a ministerial committee in order to bring in line Moroccan law with its international commitments.¹⁹² In the preamble of the 2004 *Moudawana* it is clearly stated that the law was created in accordance with Morocco's commitment to international human rights and that provisions of international conventions were directly implemented. The following will give a summary of the measures of implementation taken by Morocco focusing on the situation of the child born out of wedlock and how their situation was directly influenced by the CRC.¹⁹³

1. Improvements

One of the most important improvements is the definition of a child in the context of the legal age for marriage, labor and criminal responsibility, which was criticized in the Concluding Observations in 1996.¹⁹⁴ Art. 1 CRC describes the child as a human being below the age of eighteen years. Morocco now has raised the age of marriage and criminal responsibility to 18 years and the age to be allowed to work to 15 years instead of 12 years.¹⁹⁵ With the increase in the marriageable age, the discriminatory differentiation between boys and girls was also removed.

The general principle of the child's best interest was introduced to the *Moudawana* (e.g. art. 163, 166, 171, 178, 244) according to art. 3 CRC.¹⁹⁶ For example, Art. 166 *Moudawana* that entitles children who have reached the age of 15 to choose their custodian implements the principle of the child's best interest but also its right to express his or her view (art. 12 CRC).¹⁹⁷ The interest of a child can further be promoted through the joint custody of the parents (art. 164 *Moudawana*) and the fact that a mother is given priority for custody and does not automatically lose custody if she remarries (art. 171, 145, 175 *Moudawana*). This satisfies art. 18 CRC.¹⁹⁸

One of the biggest achievements to fight the discrimination of children born out of wedlock is art. 146 and 147 *Moudawana*, whereby children can also be recognized through the mother since filiation to the mother has the same effects as filiation to the father and children can, for

¹⁹¹ UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations: Morocco, 30 October 1996, CRC/C/15/Add.60, available at: <http://www.refworld.org/docid/3ae6af5b14.html>, last accessed 27 September 2015 (*cit.* Concluding Observations 1996, ...), 2, 5 where the Committee on the Rights of the Child expresses its concerns about the situation of children born out of wedlock; HASHEMI, *supra* n. 188, at 253 citing a member of the Committee on the Rights of the child, Judith Karp, in the summary record of Morocco 1996.

¹⁹² ALI, *supra* n. 121, at 186.

¹⁹³ This summary was created with the help of different reports about Morocco and the CRC: Concluding Observations 1996; UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Morocco, 17 March, 2006, CRC/C/OPSC/MAR/CO/1, available at: <http://www.refworld.org/docid/45377ed80.html>, last accessed 27 September 2015 (*cit.* Concluding Observations 2006, ...); UN Committee on the Rights of the Child (CRC), Consideration of the reports submitted by States parties under article 44 of the Convention, Third and fourth periodic reports of States parties due in 2009: Morocco, 5 August 2013, CRC/C/MAR/3-4, available at: <http://www.refworld.org/docid/540053ea4.html>, last accessed 27 September 2015 (*cit.* Consideration, ...); Country profile.

¹⁹⁴ Concluding Observations 1996, *supra* n. 191, at 3.

¹⁹⁵ Consideration, *supra* n. 193, at 7, 16, Country profile, *supra* n. 186, at 20, 29, 44; HASHEMI, *supra* n. 188, at 222, 237.

¹⁹⁶ Consideration, *supra* n. 193, at 5 f., 17; Country Profile, *supra* n. 186, at 21, 33; HASHEMI, *supra* n. 188, at 41; WELCHMANN, *supra* n. 39, at 140.

¹⁹⁷ Consideration, *supra* n. 193, at 6; Country Profile, *supra* n. 186, at 45.

¹⁹⁸ Consideration, *supra* n. 193, at 6, 25; Country Profile, *supra* n. 186, at 27; HASHEMI, *supra* n. 188, at 231.

example, carry the name of the mother if her own father agrees.¹⁹⁹ Moreover, art. 153 to 159 *Moudawana* in general facilitate the establishment of paternity. For example, through the assumption of legitimacy (art. 151, 155, 156 *Moudawana*) or with the possibility to use medical evidence such as DNA testing (art. 16, 153, 156, 158 *Moudawana*) to prove paternity, it is made more difficult for a father to deny his paternity (art. 153, 159 *Moudawana*).²⁰⁰ In addition, in cases where the validation of the marriage contract is contestable, the child will still be considered as born within the marriage within a period of five years (art. 16, 156 *Moudawana*). Also, the fact that today it is compulsory to register every child after birth (art. 31 Civil Status Act and art. 468 Penal Code, which states that it is a criminal offense to not register a child), the fact that every child has a right to have a name (art. 20 Civil Status Act) and the fact that nationality can also be passed to the child through the mother (art. 6 Nationality Code) all improve the status of illegitimate children with or without parents and fulfills the purpose of art. 7 CRC.²⁰¹ It is an immense progress that women are given the authority to register their children themselves, that they can name them and that children without a Moroccan father are no longer stateless. However, we have seen that the implementation of this is not yet optimal. Concerning the maintenance of children born out of wedlock who do not have a father, certain progress was made, as mothers are also responsible for the maintenance of the child if the father is unable to pay (art. 199 *Moudawana*), and the failure to pay maintenance or abandonment in general are punishable acts (art. 459, 479 f. Penal Code).²⁰² Since the reform of the *Moudawana*, children have a right to inherit from their maternal grandmothers, and so a child without a father can possibly inherit.²⁰³ Furthermore, an improvement in favor of illegitimate and abandoned children is that the legal framework was revised to facilitate the system of *kafala*. The new law is in accordance with art. 9, 20 and 21 CRC.²⁰⁴

When comparing the Concluding Observations 1996 with the later reports, all reports underline that, in general, Morocco has made a lot of progress relating to the rights of the child between 1996 and 2011. A few examples are the creation of the ministerial committee in charge of the harmonization of national law with international human rights treaties and the creation of other positions and committees within the administration responsible for child matters, the formation of a Child Parliament, the setting up of a free telephone hotline for children and the establishment of a 'Plan d'Action' for children.²⁰⁵ Moreover, the cooperation with NGO's and international cooperation was intensified (art. 45 CRC), measures to raise public awareness of the Convention were implemented (something that was criticized in the Concluding Observations of 1996 although required in art. 42 CRC), especially through the education of children, teachers, social workers, lawyers, etc., and the collection of data and the realization of studies was initiated.²⁰⁶

¹⁹⁹ Consideration, *supra* n. 193, at 6; Country Profile, *supra* n. 186, at 24, 29 f.

²⁰⁰ Consideration, *supra* n. 193, at 6; HASHEMI, *supra* n. 188, at 233.

²⁰¹ Consideration, *supra* n. 193, at 9, 20 f.; Country Profile, *supra* n. 186, at 20, 42.

²⁰² Consideration, *supra* n. 193, at 26.

²⁰³ Consideration, *supra* n. 193, at 6.

²⁰⁴ Consideration, *supra* n. 193, at 9, 23; Country Profile, *supra* n. 186, at 20, 41 f.; HASHEMI, *supra* n. 188, at 245 ff.

²⁰⁵ Concluding Observations 2006, *supra* n. 193, at 2, 6; Consideration, *supra* n. 193, at 11 f., 19; Country Profile, *supra* n. 186, at 20 f., 24.

²⁰⁶ BARGACH, *supra* n. 5, at 195 f.; Concluding Observations 1996, *supra* n. 191, at 4; Concluding Observations 2006, *supra* n. 193, at 2; Consideration, *supra* n. 193, at 10, 13-15; Country Profile, *supra* n. 186, at 20, 26, 28 f.

2. Matters of Concern

Morocco has put great effort into securing children's rights. Nevertheless, a number of issues remain. Children born out of wedlock and children taken into *kafala* are still discriminated against regarding inheritance rights as no paternity can be established, although the severity of this can be minimized by the means of a gift or a bequest to these children. Yet, they have no guarantee to inherit.²⁰⁷ Furthermore, concerning the guardianship of the child, women are still discriminated against and the best interest of the child is not necessarily ensured. Art. 231 and art. 236 *Moudawana* appoint the father as the legal tutor of the child and the mother can only exercise legal representation in the absence of the father, art. 238 *Moudawana*, which is not in accordance with art. 18 CRC.²⁰⁸ Also, the registration of the child after birth needs more progress. There is still a great number of people, especially children, who are still not officially registered, with the complicated procedure, the high costs and the often disrespectful treatment by civil servants (corruption, bribery) being the biggest impediments.²⁰⁹ Further matters of concern continue to be the lack of data about children's issues, mostly concerning vulnerable children, including children born out of wedlock, which are persistent taboos, wherefore it is more challenging to collect reliable data. A main reason for the lack of data is also that, up to this day, no centralized, standardized and systematic mechanism exists for the collection of such data as well.²¹⁰ The cooperation within the state must be enhanced as well as an organization responsible for the implementation and an independent monitoring body must be established as these are lacking so far.²¹¹ Additional matters of concern are the education of children, above all for girls and children in rural areas, the illiteracy rate, sexual and domestic abuse of children and the growing number of abandoned children who often end up on the street and are exposed to any kind of abuse, whether it be economic, sexual or drug abuse.²¹²

VI. Conclusion

In the past thirty years, a lot of work has been done to reform the law in order to improve the situation of illegitimate children in Morocco and other Islamic countries. Human rights organizations, professors, politicians, activists and many more have advocated for a better status of these children and their mothers. All the same, the topic remains a taboo. Certain prejudices and principles such as *nasab* or the supremacy of the male are deeply rooted in Morocco's society and could not yet be broken. The ongoing increase in the number of children born without filiation indicates that the situation continues to be unsatisfactory, and as long as sexual relations outside of marriage remain a criminal offence, it will not improve.²¹³ A change of the whole society and mentality is required. A cultural reconstruction founded on the new

²⁰⁷ HASHEMI, *supra* n. 188, at 236 f., where a remedy on voluntary basis is discussed, which in my opinion still does not guarantee a child the right to inherit but is akin to the system of gifts.

²⁰⁸ Country Profile, *supra* n. 186, at 33.

²⁰⁹ Country Profile, *supra* n. 186, at 42; WILLMAN/KOUZZI, *supra* n. 7, at 12 f., 22

²¹⁰ Concluding Observations 1996, *supra* n. 191, at 2; Concluding Observations 2006, *supra* n. 193, at 3; Consideration, *supra* n. 193, at 14; Country Profile, *supra* n. 186, at 21.

²¹¹ Concluding Observations 1996, *supra* n. 191, at 2; Consideration, *supra* n. 193, at 10; Country Profile, *supra* n. 186, at 21; ALL, *supra* n. 121, at 193; WILLMAN/KOUZZI, *supra* n. 7, at 2.

²¹² Consideration, *supra* n. 193, at 31 ff., 45 ff., 47 f.; Country Profile, *supra* n. 186, at 21, 29 f., 36 f., 39 f.

²¹³ MONJID, *supra* n. 35, at 144.

principle of equality and responsibility is needed in order to effectively improve the rights of women and children. But such a change of culture, mentality and society will take a long time.

The implementation of the new law is not yet optimal. The judges play a central role in the implementation of the law as the new code cedes a great scope of discretion to them, whether it is the permission to marry a girl under eighteen, the allowance to have a second wife or to define the best interest of the child, meaning that the actual equality of women and the protection of children are strongly dependent on the decisions of the judiciary.²¹⁴ However, this is not an easy task to do. The judges must not only apply the *Moudawana* but also take into consideration human rights and the traditional Islamic law, which sometimes are at issue with one another.²¹⁵ For example, art. 16 and art. 156 *Moudawana* (recognition of marriage and paternity during the engagement period) are regarded as being in conflict with the precept of Islam, as they indirectly legitimize sexual relationships outside of marriage.²¹⁶ Nevertheless, most judges agree that these regulations are important for the protection of children and engaged women and therefore give more weight to the interest of the child and young women than to their religious believes.²¹⁷ Yet, judges have to constantly balance out the two legal systems. According to the survey by AÏCHA EL HAJJAMI the judges are generally open minded, they want to consider the new law and advocate the equality of women, but they sometimes hesitate due to traditions, social orders and customs and the divine law.²¹⁸ The similar impression, that judges try to take the interest of the child into account, within the confines of Islamic law had also Dr. Nadia Sonneveld²¹⁹ based on interviews with 55 judges in Morocco in 2014/2015. This is also reflected in the judgments, where reference is made to the *Moudawana* and to the religious code but seldom to any international human rights conventions, ratified by Morocco.²²⁰ The judges find that their task is the strict application of the law, considering also the new regulations and human rights, but when it comes to their discretionary power, this may only be done on the basis of the *Mālikī* law as referred to in art. 399 *Moudawana*.²²¹ This ambiguity hinders full equality in certain cases. Other reports by local NGOs reveal a more negative picture of the judiciary stating that in practice they often do not apply the relevant laws.²²² So far, there is no reporting mechanism for judicial decision, which means there is little control over the decisions taken by the judges.²²³ I imagine the truth lies somewhere in between, with each case being different, but one can certainly comprehend that the judges do not have an easy task. Furthermore, the lack of resources in the judicial system causes problems; there are not enough judges, especially no specializes family law judges.²²⁴ This

²¹⁴ EL HAJJAMI, *supra* n. 31, at 25, 63.

²¹⁵ EL HAJJAMI, *supra* n. 31, at 36 f., 64.

²¹⁶ EL HAJJAMI, *supra* n. 31, at 39.

²¹⁷ EL HAJJAMI, *supra* n. 31, at 39.

²¹⁸ EL HAJJAMI, *supra* n. 31, at 63f., 157, 166.

²¹⁹ Dr. Nadia Sonneveld is a researcher at the Radboud University Nijmegen (Netherlands) and was a scholar-in-residence for the academic year 2014-2015 at the Hillary Rodham Clinton Center for Women's Empowerment at the Al Akhawayn University in Ifrane (Morocco). Her research focused on the question as to whether women judges differ from male judges in the way they apply the Moudawana family law reform of 2004. Any reference made to Dr. Sonneveld in this article is based on a personal interview of the author with Dr. Sonneveld.

²²⁰ EL HAJJAMI, *supra* n. 31, at 157, 165.

²²¹ EL HAJJAMI, *supra* n. 31, at 165.

²²² CHARRAD, *supra* n. 10, at 9; WILLMAN/KOUZZI, *supra* n. 7, at 2.

²²³ ALI, *supra* n. 121, at 194.

²²⁴ EL HAJJAMI, *supra* n. 31, at 61 f.

leads to overloaded courts and overworked judges, who in addition, have to work in badly equipped court rooms and offices.²²⁵

A major barrier for the implementation of the new law is also the high illiteracy rate in Morocco.²²⁶ Many women are not able to read or to understand the new laws and, much less, to defend their rights. In the survey conducted by EL HAJJAMI only 16% of the trial participants affirmed to be aware of the content of the new law, which indicates that awareness campaigns by the government were not efficient enough.²²⁷ The ignorance of the new code along with the high illiteracy and poverty rates are seen as the biggest obstacles towards the full implementation of the law.²²⁸ It is the responsibility of the state, the schools and also the media to educate people about their new rights. Moreover, minorities living in the mountain areas need a special notification of the law with a version translated into their minority language.²²⁹ Education will be the main weapon to fight illiteracy, poverty, stereotypes and, hopefully in the end, the stigmatization of children born out of wedlock.

Up to this day there is a great inequality between children born to a married couple and children born out of wedlock because the traditional concept that only children born within a marriage can be legitimate survived the reform in 2004.²³⁰ Still, only the filiation to the father is legally important. The child born out of wedlock itself has no possibility to fight for its own legitimacy.²³¹ It is generally still the father who decides whether *nasab* can be established or not.²³² Although today it is theoretically possible for mothers to register the child and the child can thus obtain the status of a Moroccan citizen, this process is not as easy for the mother and the child as it should be. The report of STEPHANIE WILLMAN BORDAT and SAIDA KOUZZI about the legal empowerment of unwed mothers created in 2010 clearly shows that unwed mothers are highly discriminated against and not legally recognized.²³³ An improvement, however, can be seen in art. 156 *Moudawan*, which can be used in order to establish paternity.²³⁴ However, the high costs of these tests appear to be a great obstacle.²³⁵ The research made by EL HAJJAMI showed that, in cases where paternity tests were used, it was within a family and it was not used to prove paternity in cases of rape or sexual relations outside of marriage since in order to invoke this provision one must prove that the parties concerned were actually engaged.²³⁶ However, according to SONNEVELD, not all judges demand the same standard of proof: Usually, the judges establish *nasab* through the father's line as long as the parents, usually the mother, do not explicitly mention that the child was born out of wedlock and are able to bring

²²⁵ EL HAJJAMI, *supra* n. 31, at 62, 168.

²²⁶ The exact number obviously is difficult to determine however, studies have shown that among women approximately 60%, in rural areas even up to 89% are illiterate. CHARRAD, *supra* n. 10, at 9 (referring to a publication of Dr. Fatima Sadiqi); ENNAJI, *supra* n. 9, at 8; GUESSOUS, *supra* n. 10, at 531. According to the Country Profile, *supra* n. 186, at 15 the illiteracy rate for girls between 15 and 24 years is at 32%.

²²⁷ EL HAJJAMI, *supra* n. 31, at 78, 112, 164, 170 ; also WILLMAN/KOUZZI, *supra* n. 7, at 12.

²²⁸ EL HAJJAMI, *supra* n. 31, at 60.

²²⁹ EL HAJJAMI, *supra* n. 31, at 61.

²³⁰ MONJID, *supra* n. 35, at 146, 150.

²³¹ FOLETS/CARLIER, *supra* n. 35, at 77.

²³² FOLETS/CARLIER, *supra* n. 35, at 80.

²³³ WILLMAN/KOUZZI, *supra* n. 7, at 1, 11 (reporting the discrimination and humiliation by authorities).

²³⁴ EL HAJJAMI, *supra* n. 31, at 148.

²³⁵ EL HAJJAMI, *supra* n. 31, at 148.

²³⁶ EL HAJJAMI, *supra* n. 31, at 149; WILLMAN/KOUZZI, *supra* n. 7, at 4.

forward a witness who can testify that the woman was engaged to the father of the child. SONNEVELD states that sometimes, the judges “close their eyes” and do not ask for more than one witness while others will demand more than one witness or ask for further prove of the engagement (pictures etc.). But she adds that, in such cases the judges will not always ask for a DNA test as they are afraid it could reveal that the “accused” father is not the biological father after all. Moreover, WILLMAN and KOUZZI point out that the law does not provide for courts to order such DNA tests against the will of the biological father.²³⁷ What is striking are also the findings of judges, that cases exist where these provisions are abused by men claiming that they are engaged to a pregnant girl, only in order to get the court’s permission to marry a girl under age and/or take a second wife.²³⁸

One of the aims of the new *Moudawana* was to approach equality between men and women.²³⁹ The reformed *Moudawana* has introduced new principles such as equality, the child’s best interest and opened up to human rights concepts. It was a win for both women and children, and concerning children born out of wedlock in particular, their legal situation was improved. Yet, full equality has not been and cannot be reached with the 2004 *Moudawana*. As long as children born out of wedlock are treated differently than children born to a married couple and as long as sexual relationships outside of marriage remain a criminal offence, these children will be stigmatized and cannot be granted full legal rights. In the end, it is not a problem of religion or legislation but of the mentality. Morocco still has a lot of work to do – legally, socially, culturally and economically – in order to acknowledge illegitimate children and related issues. However, the developments of the past years have shown that Morocco is willing to do so and that it is on the right path.

²³⁷ WILLMAN/KOUZZI, *supra* n. 7, at 4.

²³⁸ EL HAJJAMI, *supra* n. 31, at 167.

²³⁹ EL HAJJAMI, *supra* n. 31, at 13, 161.